*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

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+ W.P.No.25786 OF 1996

% Dated 23-12-2005

ITC Limited.

.... Petitioner

Vs.

$ The Presiding Officer, Labour Court, Guntur & another.

…. RESPONDENTS

! Counsel for the Petitioner: Mr. C.R. Sridharan

^ Counsel for the Respondents: Mr. Ramarao Ghanta

<GIST:

> HEAD NOTE:

? Cases referred

1964(3) SCR 616

[2] (1998)8 SCC 733

[3] (2004)8 SCC 195

[4] (2002)3 SCC 25

[5] 1964 (1) LLJ

[6] 1990 (supp) SCC 287

[7] AIR 1995 SC 1715

[8] 1998(3) SCC 225;

[9] AIR 1985 SC 603

[10] 1993 Supp(2) SCC 732

[11] AIR 2003 SC 983

[12] (1993)66 FLR 876

[13] (1994)2 SCC 323

[14] (1980)4 SCC 443

[15] 1990(II) An.W.R. 152

[16] (1981)3 SCC 25

[17] (2005)8 SCC 750

[18] (1970)3 SCC67

[19] (1985)4 SCC 71

[20] AIR 1964 SC 477

[21] (2004)8 SCC 246

[22] (2005)5 SCC 100

[23] (2005)8 SCC 450

[24] (2005)8 SCC 481

[25] (1979)3 SCC 371

[26] (1993)1 LLJ 626

[27] (2002) LLR 945

[28] (2003)2 SCC 408

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.No.25786 OF 1996

ORDER:

In this writ petition, the petitioner seeks to have the award of the Labour Court, Guntur in I.D.No. 356 of 1990 dated 27.08.1996, quashed.

Facts, to the extent necessary for this writ petition, are that the petitioner, a company registered under the companies Act, 1956, carries on the business of procurement, threshing and export of unmanufactured tobacco to various countries, for which purpose it had set up two factories at Chirala and

Anaparthy. It is the petitioner's case that the services of the 2nd respondent, commenced from 23.12.1989, that he completed his six months probation by 22nd June 1990, that on an overall assessment of his performance and suitability it was found that he was not suitable to be confirmed, more so as he had unilaterally and unauthorisedly absented himself from work from 29.07.1990 and having come to know that his services would not be confirmed, he had further abstained from work from 04.08.1990 onwards. The 2nd respondent is said to have attended office only on 28.08.1990, on which date, the order dated 08.08.1990, relieving him from services, was personally served on him.

The 2nd respondent workman filed an application, under Section 2-A(2) of the Industrial Disputes Act, before the labour Court, the petitioner filed its counter affidavit thereto and the 2nd respondent filed his rejoinder. While the 2nd respondent examined himself as W.W-1, the petitioner examined two witnesses on its behalf. On behalf of the 2nd respondent Ex.W-1 to W-8 were marked as exhibits and on behalf of the petitioner Ex.M-1 to M-17 were marked as exhibits.

The Labour Court, on taking note of the admission of M.W-1 that no written order was communicated to the 2nd respondent during his period of probation regarding the target of work and that Exs.M-1 to M-6 do not contain the dates as to when they were prepared, held that there was any amount of doubt with regards the genuineness of Exs.M-1 to M-6, as copies thereof were not supplied to the 2nd respondent at any time, they did not even contain the dates of which they were prepared and that during his probation the management did not give any memo or notice to the 2nd respondent workman asking him to give his explanation for his unsatisfactory work. The Labour Court observed that when the 2nd respondent examined himself as W.W-1, he was not even confronted with Exs.M-1 to M-6 nor was any suggestion put to him that his work was not found upto the mark, that he had to improve his work, that it was unsatisfactory and it was for the first time during the course of evidence of M.W-1 that these documents Exs.M-1 to M-6 were filed into court. The Labour Court held that, in such circumstances, no sanctity could be attached to these

documents. After taking note of the evidence of W.W-1, that he had successfully completed his probation to the satisfaction of his superior officers, had requested M.W-1 to give him a letter confirming his probation after completion of the six month period but was told to continue as a regular employee and that no such confirmation letter was necessary, the Labour Court held that the petitioner-employer had admittedly not extended the period of probation of the 2nd respondent workman after completion of six months, on the other hand had allowed the 2nd respondent to continue in service thereafter and that termination of his services, without extending the period of probation and without giving notice or conducting an enquiry regarding his unsatisfactory work, was illegal and invalid. The Labour Court held that there was an implied confirmation of service when an employee was permitted to work beyond the original period of six months and that termination of service, contrary to Section 25-F of the Industrial Disputes Act, was illegal and void.

With regards the petitioner's contention that the 2nd respondent was not entitled to claim the benefit of protection under the I.D. Act, since he had not completed 240 days of continuous service, the Labour Court took note of the 2nd respondent's contention that he was appointed on 18.12.1989, that he had worked upto 03.08.1990, that he had applied for leave from 04.08.1990 to 10.08.1990, had joined duty on 12th August, had worked from 12th August to 14th August, 1990, and had gone to his village, since he had received an urgent message, intending to report back to duty after 15th August which was a public holiday. However, he was not able to come back and join duty and had therefore issued a telegram requesting for grant of leave for a period of one week and had thereafter come back on 28th August, on which date he was informed that his services were determined and he was served a copy of Ex.W-8 order. The Labour Court drew adverse inference against the petitioner on the ground that, in spite of directions, they did not choose to produce the tappal book to show as to whether the telegram sent by the 2nd respondent had been received by them or not. The Labour Court held that the order of termination of the services of the 2nd respondent (Ex.W-8) dated 08.08.1990 did not contain reasons for termination, that no enquiry was conducted and that no notice was given to the workman prior to the said order. The Labour Court further held that

since the 2nd respondent was continued in service, even after expiry of the period of probation of six months, as a regular employee, and his services were terminated without giving him one month's notice or retrenchment compensation as required under Section 25-F of the Industrial Disputes Act, termination of his services was illegal. Despite taking note of the contention of the 2nd respondent that he did not seek declaration of his probation, the labour Court, however, held that since the management had failed to extend the period of probation, they did not state that the performance of the 2nd respondent was not satisfactory during the period of probation, no rules or service conditions were produced to show that the period of probation of six months could be extended, the silence on the part of the management, even after completition of the period of six months probation by the 2nd respondent, impliedly showed that he was allowed to continue in service as a regular employee as he had completed his probation satisfactorily. The Labour Court held that termination of the services of the 2nd respondent was illegal, invalid and opposed to principles of natural justice. For the reason that the 2nd respondent had merely sent a telegram and had not approached the authorities for sanction of leave for his absence nor had he submitted any written representation requesting that he be reinstated into service, the Labour Court held that he should be deprived of back wages. The Labour Court, by its award in I.D.No. 356 of 1990 dated 27.08.1996, set aside the order dated 08.08.1990 relieving the 2nd respondent from service and directed his reinstatement with continuity of service but without backwages.

Aggrieved by the award, to the extent the 2nd respondent was directed to be reinstated with continuity of service, the present writ petition is filed by the petitioner-employer.

Before this court, Sri C.R. Sridharan, learned counsel for the petitioner, would contend that since the 2nd respondent had not completed 240 days of service at all, let alone 240 days continuous service within the 12 month period prior to termination of his services, Section 25-F of the Industrial Disputes Act has no application. Learned counsel would submit that since the 2nd respondent was appointed as a probationer on 18.12.1989 and had abstained from service from 3.8.1990 onwards, he had not put in the required service of 240 days in the 12

months period prior to his termination and even if all the days during the period from 18.12.1989 till 3.8.1990 are taken into account, he would have worked only for 229 days. Learned counsel would rely on **Sur Enamel and Stamping Works Ltd. v. Workmen, State of Haryana v. Om Parkash and Municipal Corporation, Faridabad v. Srinivas** in this regard. Learned counsel would submit that it is for the workman to establish that he had completed 240 days of service and since the said burden was not discharged by the 2nd respondent, the award of the Labour Court directing reinstatement of the workman on the ground of violation of Section 25 F of the Industrial Disputes Act is illegal and is required to be set aside. Learned counsel would rely on **Range Forest Officer v. S.T. Hadimani and Municipal Corporation, Faridabad**[3]. Learned counsel would submit that merely because an employee was permitted to work beyond the six month period of probation, stipulated in the order of appointment, it would not entitle him to claim automatic confirmation in service and it is only if the competent authority passes an order in this regard, can the services of an employee be said to have been confirmed. Learned counsel would rely on **Express Newspapers v. Labour Court, Madras, K.A. Barot v. State of Gujarat, Rajasthan State Road Transport Corporation v. Krishna Kant, Oswal Pressure Die Casting Industry v. Presiding Officer; Dhanjibhai Ramjibai v. State of Gujaraj; Ramnarain Yadav v. State of Haryana; The Commissioner of Police, Hubli v. R.S. More.** Learned counsel would rely on a judgment of the Division Bench of this Court in **Divisional Manager, L.I.C. of India v. M. Venogopal** as confirmed by the Supreme Court in **M. Venugopal v. Divisional Manager, L.I.C. of India** in support of his submission that termination of services of a probationer would not amount to retrenchment in view of Section 2(oo)(bb) of the Industrial Disputes Act, 1947.

Sri Ghanta Rama Rao, learned counsel for the 2nd respondent workman, would refer to the certified standing orders of the company to contend that in view of Clause 3, more particularly Clause 3(b), whereunder a probationary worker is defined as one who is provisionally employed to fill a vacancy in Clerical or Class ‘A’ or Class ‘B’ (Engineering Department) and has not completed the period of probationary employment specified in his letter of engagement, the

services of the 2n d respondent must be deemed to have been confirmed. Learned counsel would submit that since the period of probation fixed in the order of appointment is six months which period has been completed by the 2nd respondent, he cannot be said to be a probationery worker under the certified standing orders of the company and he must be deemed to be a regular employee. Learned counsel would contend that irrespective of whether or not the 2nd respondent workman had worked for 240 days, in the 12 month period prior to his termination, it was always open to him to approach the labour court under Section 2A (2) of the Industrial Disputes Act challenging termination of his services and would rely on **Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court** and **R. Mallesham Vs. The Additional Industrial Tribunal-Cum- Additional Labour Court, Hyderabad**. Learned counsel would submit that since the Labour Court, on a proper appreciation of the evidence on record, had rightly come to the conclusion that the 2nd respondent is deemed to have been confirmed in service, this Court, in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India, would not sit in appeal over the findings of the Tribunal, nor would it re-appreciate the evidence on record to come to a conclusion different from that of the Tribunal.

Before examining the rival contentions, it is necessary to note certain provisions of the Industrial Disputes Act, relevant to the present case. Section 2(k) defines “Industrial Dispute” to mean, any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or with the conditions of labour, of any person. Section 2(oo) defines “retrenchment” to mean, termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include- (a) voluntary retirement of the workman; or (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or (bb) termination of the service of the workman as a result of non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or (c) termination of the

service of a workman on the ground of continued ill-health. Section 2(s) defines workman to mean, any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under the Act, in relation to an industrial dispute, to include any such person who has been dismissed, discharged or retrenched in connection with or, as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute.

Section 2-A reads thus:

2-A. Dismissal etc., of an individual workman to be deemed to be an Industrial Dispute:-

(1) Where any employer discharges, dismisses, retrenches or otherwise terminates the service of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

(2) Notwithstanding anything in Section 10, any such workman as is specified in sub-section (1) may, make an application in the prescribed manner, direct to the Labour Court for adjudication of the dispute referred to therein; and on receipt of such application, the Labour Court shall have jurisdiction to adjudicate upon any matter in the dispute, as if it were dispute referred to or pending before it, in accordance with the provisions of this Act, and accordingly all the provisions of this Act shall apply in relation to such dispute as they apply in relation to any other industrial dispute.

Section 2-A creates a legal fiction. Any dispute connected with, or arising out of discharge, dismissal, retrenchment or termination is deemed to be an industrial dispute and in such circumstances the workman is entitled under sub-section (2) thereof to make an application to the Labour Court for adjudication of the dispute without having to seek a reference under Section 10 of the Act. Chapter V-A of the Industrial Disputes Act relates to lay off and retrenchment and Section 25-B and 25-F thereunder read thus:-

25-B. Definition of continuous service:- For the purposes of this chapter,

1. a workman shall be said to be in continuous service, for a period if he is, for that period, in uninterrupted service, including service, which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not due to any fault on the part of the workman.

2. Where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

a. for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer not less than-

i. one hundred and ninety days in the case of a workman employed below ground in a mine; and

ii. two hundred and forty days, in any other case:

b. for a period of six months, if the workman during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than

i. ninety-five days, in the case of a workman employed below ground in a mine; and

ii. one hundred and twenty days, in any other case.

Explanation:- For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

i. he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1964 (20 of 1946), or under this Act or under any other law applicableto the industriall esablishment;

ii. he has been on leave with full wages, earned in the previous year;

iii. he has been absent due to temporary disablement caused by accident arising out of, and in the course of his employment; and

iv. in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks.

25-F. Conditions precedent to retrenchment of workmen:-

No workmen employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

a. the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workmen has been paid in lieu of such notice, wages for the period of the notice.

b. The workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and

c. Notice in the prescribed manner is served on the appropriate Government (or such authority as may be specified by the appropriate Government by notification in the Official Gazette).

To fall within the definition of retrenchment under Section 2(oo) and for claiming protection under Section 25-F of the Industrial Disputes Act, the concerned workman should be employed in an industry and must have rendered continuous service, for not less than one year, under the employer. Since admittedly the petitioner, who was initially appointed in December 1989, was terminated from service in August, 1990, he has not rendered continuous service of one year.

In support of his submission that a workman is required to actually work for one year to claim protection of Section 25-F of the Industrial Disputes Act, Sri C.R. Sridharan, learned counsel for the petitioner, would rely on **Sur Enamel and Stamping Works Ltd[1],** wherein the Supreme Court held thus: -

"On the plain terms of the section only a workman who has been in continuous service for not less than one year under an employer is entitled to its benefit. "Continuous service" is defined in Section 2(*eee*) as meaning uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorised leave or an accident or a strike which is not illegal or a lock-out or a cessation of work which is not due to any fault on the part of the workman. What is meant by "one year of continuous service" has been defined in Section 25-B. Under this section a workman who during a period of twelve calendar months has actually worked in an industry for not less than 240 days shall be deemed to have completed one year of continuous service in the industry. Nagen Bora and Monoharan were both reappointed on 10-3-1959. Their services were terminated on 15-1-1960. Thus their total period of employment was less than 11 months. It is not disputed that period of their former employment under the company prior to their reappointment on 10-3-1959 cannot be taken into consideration in computing the period of one year, because it is common ground that their reappointment on 10-3-1959 was a fresh appointment. The position therefore is that during a period of employment for less than 11 calendar months these two persons worked for more than 240 days. In our opinion that would not satisfy the requirement of Section 25-B. Before a workman can be considered to have completed one year of continuous service in an industry it must be shown first that he was employed for a period of not less than 12 calendar months and, next that during those 12 calendar months had worked for not less then 240 days. Whereas in the present case, the workmen have not at all been employed for a period of 12 calendar months it becomes unnecessary to examine whether the actual days of work numbered 240 days or more. For, in any case, the requirements of Section 25-B would not be satisfied by the mere fact of the number of working days being not less than 240 days."

The judgment in **Sur Enamel and Stamping Works Ltd**[1] was considered in **Surendra Kumar Verma**[14], wherein the Supreme Court held:-

"Section 25-B as it read prior to Act 36 of 1964, in the light of the then existing Section 2 (*eee*), certainly lent itself to the construction that a workman had to be in the service of the employer for a period of one year and should have worked for not less than 240 days before he could claim to have completed one year's completed service so as to attract the provisions of Section 25-F. That precisely was what was decided by this Court in *Sur Enamel and Stamping Works Ltd.* v. *Workmen: (1964)3 SCR 616.*

Act 36 of 1964 has drastically changed the position. Section 2(*eee*) has been repealed and S. 25-B(2) now begins with the clause "where a workman is not in continuous service . . . for a period of one year". These changes brought about by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months; it is not necessary that he should have been in the service of the employer for one whole year. So we hold that Usha Kumari and Madhu Bala are in the same position as the other appellants."

It is not necessary for the purpose of sub-section (2)(a) of Section 25 B that the workman should be in service for a period of one year and that his service is continuous service within the meaning of sub-section (1). If his case is governed by sub-section(1) then it need not be covered by sub-section (2). Sub-section (2) envisages a situation not governed by sub-section (1) and provides for a fiction to treat a workman in continuous service for a period of one year despite the fact that he has not rendered uninterrupted service for one year but has rendered service for a period of 240 days during the period of 12 calendar months counting backwards and just preceding the relevant date, being the date of retrenchment. (**Mohan Lal Vs. Bharat Electronics Ltd, Surendranagar District Panchayat Vs. Dahyabhai Amarsingh**).

As such the requirement of actually working continuously for one year to claim the protection of Section 25-F of the Industrial Disputes Act would no longer apply.

In **Ramakrishna Ramnath v. Presiding Officer, Labour Court**, the Supreme Court held:-

"Further no such workman can claim the benefit of the provision for compensation unless he can show that he has been in continuous service for not less than one year under the employer. Under Section 25-B a workman who during the period of 12 calendar months has actually worked in an industry for not less than 240 days is to be deemed to have completed one year's service in the industry. Consequently an enquiry has to be made to find out whether the workman has actually worked for not less than 240 days during a period of 12 calendar months immediately preceding the retrenchment. These provisions of law do not show that a workman after satisfying the test under Section 25-B has further to show that he has worked during all the period he has been in the service of the employer for 240 days in the year"

The question which then arises is as to whether the 2nd respondent would satisfy the requirement of Section 25-B (2)(a)(ii), whereunder a workman who has actually worked under the employer for not less than 240 days during the period of 12 months, preceding the date of his termination from service to which calculation is to be made, shall be deemed to be in continuous service under an employer for a period of one year.

For the purpose of calculating the number of days an employee has worked, the explanation to Section 25-B provides a fiction that the number of days during which a workman has absented himself would, for the purpose of computation, include the situations prescribed thereunder. The expression "actually worked under the employer" in the explanation to Section 25-B is only clarificatory, cannot be used to limit the expanse of the main provision and is capable of comprehending other days during which a workman is in employment. Sub-sections (1) and (2) of Section 25-B comprehend different situations for calculation of continuous service, one for not less than one year and the other, continuous service which is less than one year but for 240 days in the 12 months preceding the date of termination under an employer. (**Workmen Vs. American Express International Banking Corporation** and **Surendranagar District Panchayat**[17]).

From the date of his appointment i.e., 18.12.1989 till his services were terminated on 3.8.1990 even if the 2nd respondent is to be presumed as having worked on all the days, he would have been in continuous service only for 229 days falling short of the minimum required 240 days service and as such would not be entitled for the protection of Section 25-F of the Industrial Disputes Act. A specific plea has been raised in this regard by the petitioner. While it is not

for this Court to re-appreciate the evidence on record or to sit in appeal over the findings of the Tribunal, while exercising Certiorari jurisdiction under Article 226 of the Constitution of India, errors of law apparent on the face of record are amenable to correction by this Court. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding the Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence or is perverse that would be regarded as an error of law which can be corrected by a writ of certiorari. (**Syed Yakoob v. K.S. Radhakrishnan**).

The very fact that the Tribunal, while denying back wages to the 2nd respondent, held that the 2nd respondent had not obtained sanction of leave for his absence would show that after 3.8.2000, the absence of the 2nd respondent from work was undoubtedly unauthorized and, in view of Section 25-B of the Act, such period cannot be taken into consideration for computation of the minimum period of service required to be put in for claiming protection under Section 25-F of the Industrial Disputes Act. Curiously the Tribunal draws an adverse inference against the petitioner for having failed to produce the tappal book to show as to whether or not it had received the telegram supposed to have sent by the 2nd respondent seeking leave. After holding that adverse inference can be drawn for non-production of records and that the management can grant extra-ordinary leave even if the workman is absent and that it cannot be termed as misconduct, the Tribunal concludes that it must be held that the services of the 2nd respondent was continuous from the date of his appointment till 27.08.1990 and that the total number of working days put in by the workman would be more than 240 days in the preceding 12 months of his service. Having recorded such a finding, the Tribunal holds that the 2nd respondent is entitled for one month's notice or notice pay or retrenchment compensation as per Section 25-F of the Industrial Disputes Act and because there is violation of the said provision it should be held that the termination of the services of the 2nd respondent workman was illegal.

BURDEN TO PROVE, THAT HE HAD WORKED FOR 240 DAYS IN THE TWELVE MONTH PERIOD PRIOR TO HIS TERMINATION, IS ON THE WORKMAN:

In **Om Parkash**[2], the Supreme Court held :-

"The second question is whether there was a violation of Section 25-F of the Act. The authority below has come to the conclusion that he had worked for a period from 10-8-1985 to 30-6-1986 which would be less than one year. Therefore, the authority was wrong in concluding that he had worked for 240 days during 12 months immediately preceding the date of cessation of work. Besides no information was laid before the authority as to how many days during that period he had worked for, but in any case, he had not worked for 12 calendar months. There is also no evidence that he had worked for 240 days to satisfy Section 25-B of the Act. Therefore, the authority was wrong in coming to the conclusion that there was a violation of Section 25-F of the Act……"

In **Range Forest Officer**[4]**,** the Supreme Court held :

"**…….**In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. ……."

In **Municipal Corpn., Faridabad**[3]**,** the Supreme Court held:-

"For the said purpose it is necessary to notice the definition of "continuous service" as contained in Section 25-B of the Act. In terms of sub-section (2) of Section 25-B if a workman during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for 240 days within a period of one year, he will be deemed to be in continuous service. By reason of the said provision, thus, a legal fiction is created. The retrenchment of the respondent took place on 17-5-1995. For the purpose of calculating as to whether he had worked for a period of 240 days within one year or not, it was, therefore, necessary for the Tribunal to arrive at a finding of fact that during the period between 5-8-1994 to 16-5-1995 he had worked for a period of more than 240 days. As noticed hereinbefore, the burden of proof was on the workman….."

In **M.P. Electricity Board Vs. Hariram,** the Supreme Court held:-

". … We cannot but bear in mind the fact that the initial burden of establishing the factum of their continuous work for 240 days in a year rests with the respondent applicants."

In **Manager Reserve Bank of India Vs. S. Mani,** the Supreme Court held that the initial burden of proof was on the workmen to show that they had completed 240 days of service and that the Tribunal had erred in not considering the question from that angle and in holding that the burden of proof was upon the employer.

In **Surendranagar District Panchayat Vs. Jethabhai Pitamberbhai**, the Supreme Court held:-

".....From the tenor of the judgment of the Labour Court and the High Court, it is apparent to us that the judgments have proceeded on the premise as if the burden of proof lies on the employer to prove that the employee had not worked with him for 240 days in the preceding year immediately before the date of his termination……" The claimant, apart from his oral evidence has not produced any proof in the form of receipt of salary or wages for 240 days or record of his appointment or engagement for that year to show that he has worked with the employer for 240 days to get the benefit under Section 25-F of the Industrial Disputes Act. It is now well settled that it is for the claimant to lead evidence to show that he had in fact worked for 240 days in a year preceding his termination.

"……. the Labour Court and the High Court committed an error in placing the burden on the employer to prove that the workman had not worked for 240 days with the employer. The burden of proof having been on the workman, he has to adduce evidence in support of his contention that he has complied with the requirement of Section 25-B of the Industrial Disputes Act. In the present case, apart from examining himself in support of his contention the workman did not produce any material to prove the fact that he worked for 240 days. In the absence of evidence on record the Labour Court and the High Court have committed an error in law and fact in directing reinstatement of the respondent workman……"

In **Batala Coop. Sugar Mills Ltd. V. Sowaran Singh,** the Supreme Court held:-

"…….. So far as the question of onus regarding working for more than 240 days is concerned, as observed by this Court in Range Forest Officer v. S.T. Hadiman (2002)3 SCC 25, the onus is on the workman….."

"….In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced

by the workman. On this ground alone, the award is liable to be set aside……."

In Surendranagar District Panchayat Vs. Dahyabhai Amarsingh[17] the Supreme Court held that it is necessary for the workman to produce relevant material to prove that he had actually worked with the employer for not less than 240 days during the period of 12 calendar months preceding the date of termination and that mere oral evidence of the workman would not suffice to discharge the burden.

Since the onus to prove that he had worked for 240 days lies on the workman and the burden cannot be thrust on the petitioner-employer to prove to the contrary, the Tribunal could not, in law, have drawn an adverse inference against the petitioner and should not have accepted the self-serving statement of the 2nd respondent or to have recorded a finding that the 2nd respondent had worked till 27.8.1990.

It is not in dispute that if the period from 18.12.1989 upto 3.8.1990 is alone taken into consideration, the 2nd respondent would not have put in the minimum required 240 days of service as he, even if all the days during this period is taken into consideration, would have worked only for 229 days. It is only if it is established that he had worked up to 27.8.1990, can he be said to have worked for more than 240 days. Even according to the 2nd respondent except for 3 days, between 12th and 14th August, 1990, he had abstained from duty during the rest of the period from 4.8.1990 till 27.8.1990. Even if these three days were taken into consideration, it would only take the period of service to 232 days, still short of the minimum required 240 days of service. While the 2nd respondent would contend that he sent leave application, for the period of absence from 4.8.1990 to 27.8.1990, which fact is disputed by the petitioner, the Tribunal draws an adverse inference against the petitioner with regards receipt or otherwise of the leave letters/telegrams sent by the 2nd respondent. Even if, as has been held by the Tribunal, the 2nd respondent had sent leave applications either by way of letters/telegrams, the Tribunal (having itself come to the conclusion that no sanction had been granted for leave sought by the 2nd respondent), could not have included this period from 4.8.2000 till 27.8.2000, (other than the 3 days from 12th to 14th August), in computing the minimum required period of 240 days. Section 25-B permits only authorized leave to be included in computation of 240 days and since the Tribunal, in the present case, has recorded a finding that no such leave had been sanctioned, (on which finding the Tribunal has

denied the 2nd respondent back wages), this period ought not to, in law, have been included for computation. The reasoning of the Tribunal, that the management had the power to grant extraordinary leave, is wholly irrelevant, since the question is not of existence of power, but of its exercise and as to whether leave had, in fact, been sanctioned by the petitioner in favour of the 2nd respondent. The findings of the Tribunal are perverse and are based on no evidence. The evidence on record does not show that the 2nd respondent had worked for more than 240 days within the 12 months period prior to his termination and since the onus is on him to establish this jurisdictional fact, the Tribunal must be held to have acted without jurisdiction in holding that the termination of services of the 2nd respondent was in violation of Section 25-F of the Industrial Disputes Act.

As the 2nd respondent had actually worked for less than 240 days, from the date of his appointment i.e., 18.12.1989 till 03.08.1990 i.e., for 229 days, he is not entitled for protection under Section 25-F and termination of his services would not, thereby, be rendered illegal.

In fact, Sri Ghanta Rama Rao, learned counsel for the 2nd respondent, would not seriously pursue this submission but would contend that even if the 2nd respondent is held as not having put in 240 days of service in the 12 month period prior to his termination, the Tribunal was justified in examining as to whether the petitioner's probation was confirmed and as the Tribunal had rightly held that the petitioner's services had been confirmed, his services could not have been terminated except for proved acts of misconduct, pursuant to a valid enquiry being held in this regard. Sri Ghanta Rama Rao would rely on **R.Mallesham**[15] wherein this court held that even if a workman has not put in 240 days of service he does not cease to be a workman.

The question, as to whether the 2nd respondent's services are deemed to have been confirmed on account of his being continued in service beyond the prescribed six months period of probation, could have been examined by the Tribunal in proceedings under Section 2-A(2) of the Industrial Disputes Act, is put in issue by Sri C.R. Sridharan, learned Counsel for the petitioner. While submitting that this issue may possible have been examined by the Tribunal, on a reference under Section 10 of the Industrial Disputes Act, learned counsel

submits that since termination of the services of a probationer would fall under the exception in clause (bb) of Section 2(oo), it would not amount to retrenchment and that termination of the services of a probationer is not amenable to scrutiny by the Tribunal in exercise of its jurisdiction under Section 2-A(2) of the Industrial Disputes Act.

In this regard, learned Counsel would place reliance on **Rajasthan SRTC v. Krishna Kant**[7]**,** wherein the Supreme Court held :-

"……By virtue of this provision, the scope of the concept of industrial dispute has been widened, which now embraces not only Section 2(*k*) but also Section 2-A. Section 2-A, however, covers only cases of discharge, dismissal, retrenchment or termination otherwise of services of an individual workman and not other matters, which means that — to give an example — if a workman is reduced in rank pursuant to a domestic enquiry, the dispute raised by him does not become an industrial dispute within the meaning of Section 2-A. (However, if the union or body of workmen espouses his cause, it does become an industrial dispute.) We have given only one instance; there may be many disputes which would not fall within Section 2(*k*) or Section 2-A"

While I find substantial force in the submission of Sri C.R.Sridharan that it was not open to the Tribunal, in an application filed by the workman under Section 2-A(2) of the Industrial Disputes Act, to give a declaration that a workman has successfully completed his probation and that his services are deemed to have been confirmed on his being continued in service beyond the period of probation, I do not propose to rest my conclusions on this score and intend examining the question as to whether mere continuance in service, beyond the six months probation period prescribed in the order of appointment would, in law, entitle the workman to claim that his services had been confirmed and that he no longer continues to remain on probation.

NO EVIDENCE WILL, NORMALLY, BE PERMITTED TO BE LET IN BY THE HIGH COURT IN CERTIORARI PROCEEDINGS UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

Sri Ghanta Rama Rao, learned counsel for the 2nd respondent, would place reliance on the certified standing orders, more particularly, clause 3(b) thereof to contend that since the order of appointment prescribes six months as the period of probation, continuance in service thereafter would exclude an

employee from the definition of a 'probationer' and that he shall be deemed to be a regular employee of the petitioner establishment. It is necessary to note that the certified standing orders of the petitioner company has not been marked in evidence before the Tribunal nor has any plea in this regard been taken before it. The jurisdiction, which this court exercises in Certiorari proceedings under Article 226 of the Constitution of India, is supervisory and not appellate. It is not open to either party to let in evidence for the first time before this Court. It is only the evidence on record before the Tribunal which is required to be examined. Absence of a plea and evidence on record in support of such a plea disentitles the 2nd respondent from placing reliance, on the certified standing orders, for the first time before this Court.

In **Shankar Chakravarti v. Britannia Biscuit Co. Ltd.,**, the Supreme Court held:-

"……..A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well-settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would be tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. This view expressed in *Tin Printers* (*Private*) *Ltd.* v. *Industrial Tribunal*-(1967) 2 LLJ 677 commends to us. The rules of fair play demand that where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded……".

I n **Management of Glaxo India Ltd, Madras Vs. Presiding Officer, Labour Court, Guntur** this court held that no amount of evidence can be looked upon, as a plea which was never put forward, and an allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party.

CONTINUING IN SERVICE BEYOND THE PRESCRIBED PERIOD OF PROBATION – DOES IT AMOUNT TO DEEMED CONFIRMATION:

The Tribunal expressed its doubt regarding the genuineness of Exs.M-1 to M-6 wherein the petitioner is said to have informed the 2nd respondent of his poor performance. Eschewing Exs.M-1 to M-6, as has been done by the Tribunal, and accepting its findings would only mean that (1) the 2nd respondent was not informed of his unsatisfactory work during the period of probation, (2) no order extending the period of probation of the 2nd respondent was passed by the petitioner, and (3) the 2nd respondent was permitted to continue in service beyond the probation period of six months prescribed in the order of appointment.

Would the facts, as stated above and as recorded by the Tribunal, lead to the conclusion that the services of the 2nd respondent had been confirmed, that by implication he continued to remain in service as a regular employee and since his termination was not preceded by a departmental enquiry nor was action taken against him for proved misconduct, the termination of his services is illegal?

It is well settled that unless the order of appointment or the applicable rules and regulations provide for automatic confirmation of service, mere continuance in service beyond the period of probation, without a specific order of confirmation being passed, would not enable the workman to contend that his services had been confirmed and till a specific order of confirmation is passed, the workman would continue to remain a probationer.

In **Express Newspapers (P) Ltd.[5],** the Supreme Court held:

"This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired — except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer."

In **Dhanjibhai Ramjibhai[9],** the Supreme Court held : -

"It is then submitted that the appellant enjoyed a legitimate expectation of being confirmed on the expiry of two years of probation and on successfully completing the qualifying tests

and training undergone by him. We are not impressed by that contention. It was open to the State Government to consider the entire record of service rendered by the appellant and to determine whether he was suitable for confirmation or his services should be terminated. There was no right in the appellant to be confirmed merely because he had completed the period of probation of two years and had passed the requisite tests and completed the prescribed training. The function of confirmation implies the exercise of judgment by the confirming authority on the overall suitability of the employee for permanent absorption in service……."

"……..A distinction is sought to be drawn between a probationer whose services are terminated on the expiry of the period of two years and a probationer, who has completed the normal span of two years and whose services are terminated some time later after he has put in a further period of service. We are unable to see any distinction. It is perfectly possible that during the initial period of probation the confirming authority may be unable to reach a definite conclusion on whether the candidate should be confirmed or his services should be terminated. Such candidate may be allowed to continue beyond the initial period of two years in order to allow the confirming authority to arrive at a definite opinion. It seems to us difficult to hold that a candidate enjoys any greater right to confirmation if he is allowed to continue beyond the initial period of probation……"

In **K.A. Barot[6],** the Supreme Court held that in the absence of a rule to the contrary, probation does not transform itself into confirmation unless there is a specific order.

In **K. Dasarath Vs. Labour Court-I, Andhra Pradesh, Hyderabad**, this court held that a probationer cannot claim confirmation as a matter of right and it is the competent authority to judge the same taking into consideration several facts and circumstances and to make an overall assessment.

In **Commissioner of Police v. R.S. More,** the Supreme Court held :-

"No specific order having been passed by any authority, certifying the satisfactory completion of probation period of the respondent, has been brought to our notice….. Admittedly, the order discharging the respondent, in exercise of powers under Rule 6, has been passed after the extended period of probation was over. In our view, however, that itself would not entitle the respondent to have claimed deemed confirmation in absence of the specific order to that effect……"

While recording the fact that the workman had not requested for a declaration of his probation, the Tribunal recorded a finding, on a question not even raised by the workman, that since the management had failed to extend the period of probation nor did it state that the services of the 2nd respondent was not satisfactory within the period of probation and no rules or service conditions were produced to show that the period of probation of six months

could be extended, silence on the part of the management, even after completion of the probation period of six months, would impliedly show that the 2nd respondent was allowed to continue in service as a regular employee of the petitioner management, since he had completed the period of probation satisfactorily. To say the least the conclusions of the Tribunal are inconsistent and self-contradictory. Having recorded that the workman had not requested for declaration of his probation, it was not open to the Tribunal to examine this question nor was it entitled, in law, to hold that the workman had completed the period of probation satisfactorily and that he continued in service as a regular employee of the establishment. The catena of judgments of the Supreme Court aforementioned clearly reveal that, in law, the workman continues to remain on probation till a specific order confirming his services is passed by the employer and mere silence on the part of the employer or failure to pass orders extending the period of probation does not lead to the inference that the services of the workman had been confirmed, that he ceased to be a probationer and that he became a regular employee of the establishment.

Since, in law, the 2nd respondent continued to remain on probation at the time of termination of his services, Clause (bb) of Section 2(oo) would apply and it cannot be held either that he was retrenched from service or that Section 25-F of the Industrial Disputes Act is attracted. I n **M. Venugopal[13],** the Supreme Court held:-

Any such termination, even if the provisions of the Industrial Disputes Act were applicable in the case of the appellant, shall not be deemed to be "retrenchment" within the meaning of Section 2(*oo*), having been covered by exception (*bb*)……. This Court from time to time held that the definition of "retrenchment" being very wide and comprehensive in nature shall cover, within its ambit termination of service in any manner and for any reason, otherwise than as a punishment inflicted by way of disciplinary action. The result was that even discharge simpliciter was held to fall within the purview of the definition of "retrenchment". (State Bank of India v. N. Sundara Money: AIR 1976 SC 1111, Santosh Gupta v. State Bank of Patiala: AIR 1980 SC 1219.) Now with introduction of one more exception to Section 2(*oo*), under clause (*bb*) the legislature has excluded from the purview of "retrenchment" (*i*) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry; (*ii*) such contract being terminated under a stipulation in that behalf contained in contract of employment. It need not be impressed that if in the contract of employment no

such stipulation is provided or prescribed, then such contract shall not be covered by clause (*bb*) of Section 2(*oo*). In the present case, the termination of service of the appellant is as a result of the contract of employment having been terminated under the stipulations specifically provided under Regulation 14 and the order of the appointment of the appellant. In this background, the non-compliance of the requirement of Section 25-F shall not vitiate or nullify the order of termination of the appellant.

The order of the Tribunal is patently illegal and its findings are perverse and are based on no evidence. The award of the Tribunal suffers from apparent errors of law and as such is quashed. The writ petition is allowed. There shall however be no order as to costs.

Dt: .12.2005.

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RAMESH RANGANATHAN, J

Note: L.R. Copy to be marked

B/o

MRKR/ASP